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THE
AMERICAN LAW REGISTER.

JUNE, 1869.

OUR PATENT SYSTEM.

A WRITER in the August number of the Atlantic Monthly, upon "Ideal Property," seriously recommends that the United States shall drop its present system of examining applications for patents on inventions, to see that they contain novelty; and shall make the Patent Office, as the District Courts are now in reference to copyrights, a mere register, where any one may deposit his specification of what he alleges to be his invention, and then trust to the absolute novelty of the device, as it may be possible to establish it before the courts, for protection against pirates and infringers.

Hon. Elisha Foote, the Commissioner of Patents, has lately made the regular annual report of the Office to Congress; and he recommends therein the present system, only he would have the examinations made more strict and thorough. Commenting upon this report, the Scientific American, the paper best known to inventors and mechanists in this country, favors the total abolition of examinations, from which editorial opinion a contributor to the same periodical has expressed his dissent. Taking these articles all together, it is clear that the question of changing our present law is undergoing considerable discussion; and with reference to this question it is proposed to say a few words.

First, with reference to the nature of property in inventions. The text-writers upon this subject seem to have had some difficulty

in making it plain that it is right to make patent laws at all. It cannot be doubted that when a man has made an invention, literary, chemical, or mechanical, it is exclusively his own so long as he chooses to keep it a secret to himself; no one else can possibly make use of it till the inventor chooses to make it known, and there is no possible way of extracting it from him, or even of knowing that he has made an invention, except by his own free will.

So that it is but a matter of policy on the part of the state, a contract which selfishness, pure and unmixed, might induce the state to make, to offer to the inventor a monopoly of his invention for a limited time, if he will but make his device so public that all citizens may make and use it at the expiration of the time limited. The state drives an excellent bargain with the inventor when it does this; and most people will admit that a law knows no better reason for its creation than this.

Since this is so, it is for the interest of both parties to the contract—the state and the inventor—that the law shall be so framed as to best protect and reward the inventor during the existence of the monopoly, so that as many persons may be induced to become inventors as possible; and how best to attain this end is really the question, or problem, under discussion. Will the inventor be better protected by a system that has no examination for novelty than now?

The United States contain thirty millions of inhabitants, a very small fraction of the civilized world, or of that part of the world which has patent laws; for instance, Russia has one hundred millions of inhabitants, and patent laws; and yet we produce every year more inventions and patents than all the world beside. It is plain to all the world that this country is, *par excellence*, the home of inventive genius; and in the very tales and romances of other lands, the inevitable Yankee is made to whittle himself into a fortune. This is not altogether because of the “universal Yankee genius,” but is owing somewhat to the differences in the patent systems of this and other countries.

Most other nations have just such a patent system as the Atlantic writer and the Scientific American propose. The Atlantic article stated that *all* other countries have such systems, but, as the present writer believes, the statement is incorrect. In the Argentine Republic, The Grand Duchy of Baden, Bavaria, Ja-

maica, The Netherlands, Prussia, Russia, and Wurtemberg, examinations are required by law; but it is generally understood that the examinations are not nearly so well made there as here: probably the happy medium of statement in the matter is that nowhere else are regular and searching examinations made as with us.

The fostering influence of our law has had much to do with producing our first-class inventors: our present law holds out such substantial rewards, that men are induced to devote themselves exclusively to invention, with a reasonable hope of support and success. The Atlantic writer says: "All great inventors, and most of the lesser, are specialists, and in their own lines consider rightly that they know more than the Patent Office;" that the present system "helps the charlatan and hinders the *savant*;" that "it is a cheap repute and brass-farthing celebrity that the United States boasts of when it plumes itself on the progress of invention shown by the number of patents issued."

The gist of his reasoning, and that of all who oppose our present system, is that the examinations are often imperfectly made, and patents granted when they ought not to be. The present writer ventures to presume that if these examinations are properly made all will concede that our system is the best in the world, and that it is only because of failure in this respect that the whole law is objected to,—that is, the objectors would change the law because its provisions are not perfectly carried out.

Let us see how this reasoning would work with another law. Because we do not always succeed in convicting thieves and forgers, is it best to abolish the law which decrees their punishment? Because examinations are not thoroughly made, shall we therefore abolish the examinations? To most minds the answer is plain,—assuredly not. The Atlantic writer further says: "Were it possible to obtain a complete knowledge of the work, published and unpublished, before the world and in the closet, of all students, a preliminary examination might insure novelty. It cannot do this; and, of course, without experiment or a perfect knowledge of principles and a perfect reasoning faculty, utility cannot be insured." This must be regarded as mere statement; until it is shown *why* it is not possible to make a good examination in the large majority of cases, there is, probably, not much chance for argument. This has not been done so far, and, probably, will not be. Because these examinations are not now well made, is no reason that they

cannot be: many things are not done at Washington that ought to be, and this is one. The writer believes that most persons will agree with him, that by a better and more divided system of examinations, coupled with the employment of examiners whose services can only be had by the payment of higher salaries, this work might be done nearly to perfection.

It certainly could be done much better than it is at present. Suppose that it is only so well done that nothing described in a home or foreign publication, or known to the present generation at home, shall obtain the seal of the Patent Office, and the work is done well enough.

If a device, old but useful, has passed out of the memory of the present generation and is again invented, the inventor does as much good as though he had discovered something entirely new. The law might be somewhat modified to meet this view of the case, but such a modification would be no radical change in our present system.

The remedy proposed by the writers referred to, is of the kind indigenous to the American mind; it springs from the purely American idea that everything can be done by legislation, and that all that is needed when one law is badly executed, is to pass another of an opposite nature. Does gold go up, or the balance of exchange stand against us; do men get drunk, or married people get divorced; do the heavens threaten to fall, or the waters to rise—straightway we proceed to cure the trouble with a new law, when the appropriate and proper thing, under the circumstances, is to see that the present one is well executed.

The largest patent-soliciting house in London has gratuitously said, in a recent circular, that "the American origin of an invention is a recommendation in England." What could have made John Bull look so favorably upon us in this respect, when we well know that he will never acknowledge us to be his superiors in invention? It is because he knows that when a patent, which is really useful, passes the ordeal of our Patent Office, it is, probably, *new*. They have no examinations in England; and parties, manufacturing under good and valid patents, are harassed greatly by interfering, subsequent patents procured for the sole purpose of blackmailing; and which, as a general rule, the manufacturers find it cheaper to buy up than to litigate.

The Atlantic writer says that our present law "helps the charla-

tan and hinders the *savant*." *How* "helps the charlatan?" Would not the charlatan be pleased if he could, at will, patent anything under the sun, and then hawk it about the country with its truly "pinchbeck endorsement?" *How* "hinders the *savant*?" Is not the *savant's* real invention perfectly protected by our present law? It can be no better protected by any law; and, at present, there is a preliminary barrier for the charlatan who would vex him with a patent copied from his own to surmount, which barrier would not exist if the examinations were abolished.

Abolish all preliminary examinations for novelty, and one of two things happens; either patents will become, for the most part, valueless; or the country will be overrun with charlatan inventors. Such abolition would surely tend to crush poor inventors and help rich ones. In all probability, no patent could be sold for a dollar that had not appended to it a full and accurate history of all similar inventions, showing that no one had ever preceded the present patentee, which history would have to be certified to, by some specialist or expert, whose name and reputation would be a guaranty that the history was correct; all this at a cost that not one inventor in a hundred could afford; and it is a reasonable prophecy, that not one-tenth of the number of patents granted now, would be granted after such a change as proposed. This must happen sooner or later, for if, at first, the other extreme is reached, and the country is flooded with patents on old devices, the very word, "patent," would soon become a synonym for worthlessness, and a severe reaction would take place.

It is to be feared that we should learn from sad experience how much our national progress and prosperity are based upon the inventive genius of our country. Granted that a majority of our patents are worthless, who can estimate the incalculable harm that would result from retarding and repressing the inventive genius of our countrymen, by withholding the reasonable rewards we now hold out? Granted that the majority of our patents are worthless, they do no harm; and while there would not, probably, be one-tenth of the present number of patents granted under a system changed as proposed, there is no good reason for supposing that any larger percentage of the patents then granted would be useful than of those granted now. Indeed, it is quite reasonable to suppose that this percentage would be still smaller, for only the rich

inventors could then afford to put their patents into saleable shape, and wealth is not the soil in which true invention flourishes.

When we stop for a moment to reflect, we must be convinced that our magnificent material prosperity, as a nation, is owing very largely, more than to any other cause, to the prolific inventive genius of our people.

The best impression we could possibly put upon our national coat-of-arms would be a pencil, hammer, and drill; for mainly by the aid of these and their kin have we made our great nation what it is in material prosperity.

The true way to better ourselves in patent matters is not to radically change the law, but to make the examinations under it more strict, searching, and accurate.

There can be little doubt that it is possible to so perfect these examinations that ninety per cent. of all patents granted shall be novel; and when we reach this point, we shall be carrying out the law more perfectly than any other law was ever executed. We shall make patents still more valuable than they are, foster still more our native genius for invention, and our country will grow and prosper in proportion.

W. E. S.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont, January Term 1869.

JAMES SHEEHY v. JOHN ADARENE.

Where a verbal contract is to be performed within a year by one party, but not by the other, the question whether the Statute of Frauds applies or not depends on whether the suit is brought against the party who was to perform his part within the year. If it is so brought, the statute would not apply, but if brought against the party whose agreement was not to be performed within the year, then the statute would be a bar.

On the 19th of March 1864 the parties made a verbal contract by which the defendant agreed to furnish the plaintiff, on the 1st day of April next following, or within a short time thereafter, a cow for the use of the plaintiff, or forty dollars in money with which to purchase a cow, and that the plaintiff was to have the use of said cow for the period of one year from said 1st day of